

GIFT-SPLITTING FOR GST PURPOSES FOR TRUSTS IN WHICH THE SPOUSE HAS AN INTEREST: THE AUTHORITIES

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I. Two Different Scenarios for Gift-Splitting.

When a trust includes the spouse as a permissible beneficiary, but also has a portion which is ascertainable and severable for the children, then gift-splitting is effective for regular gift tax purposes ONLY for the portion that is attributable to the children. However, for GST purposes, Treas. Reg. §26.2652-1(a)(4) provides that if the “spouse **makes an election**” (emphasis added) to gift split, the total contribution is treated as coming one-half from each spouse “regardless of the interest the electing spouse is actually deemed to have transferred under section 2513.” In other words, for GST purposes the election includes the WHOLE trust, even though for regular gift tax purposes the gift-splitting election was effective only for PART of the trust.

However, if NO portion of the trust is “ascertainable and severable” for the non-spousal beneficiaries, is the answer the same? For GST purposes, have the spouses in both scenarios “made an election” to gift-split, even though for section 2513 purposes the consent is not “effective” for some or all of the gift? *We submit that they have not.*

II. The Gift Tax Rules.

A. **Section 2513(a)(1)** provides in pertinent part:

A gift made by one spouse **to any person other than his spouse** shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift, each spouse is a citizen or resident the United States. This paragraph shall not apply with respect to a gift by a spouse of an interest in property if he creates in his spouse a general power of appointment, as defined in section 2514(c), over such interest. [Emphasis added.]

B. **Treas. Reg. §25.2513-1(b)** provides that the consent to gift split is effective with respect to all gifts made to third parties during the calendar period subject to four exceptions, the fourth of which provides:

If one spouse transferred property in part to his spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and hence severable from the interest transferred to his spouse. [Treas. Reg. §25.2513-1(b)(4).]

C. **Rev. Rul. 56-439, 1956-2 C.B. 605**, provides in its entirety, as follows:

Where a gift is made in trust the terms of which provide that the trustee is to distribute any part or all of the income or principal of the trust to or among the spouse of the donor and any lineal descendants and/or spouses of lineal descendants of the donor at such times and in such proportions and amounts as he in his sole discretion shall determine, the value of the right to receive the income or principal to be distributed to the wife is not susceptible of determination. See Rev. Rul. 55-303, C. B. 1955-1, 471. Under such circumstances, the gift to the wife is not severable from the gifts to the other beneficiaries. Accordingly, it is held that the gift may not **to any extent be considered as made one-half by the donor and one-half by his spouse** within the meaning of section 2513 of the Internal Revenue Code of 1954. [Emphasis added.]

D. ***Wang v. Commissioner, T.C. Memo. 1972-143***, citing Andrew Geller, 9 T. C. 484, and William H. Robertson, 26 T. C. 246, states that in determining whether a remainder interest is ascertainable as of the time of the gift and thus eligible for split-gift treatment under section 2513, the same principles are applied as are employed in determining whether a charitable remainder interest subject to an invasion power is ascertainable and thus deductible for estate tax purposes (under rules in effect prior to the enactment of sections 2055(e)(1) and (e)(2)).

1. Generally, the charitable remainder interest would be ascertainable if the invasion power was limited by an ascertainable standard such that the possibility of invasion could be measured or stated in definite terms of money. Rev. Rul. 70-450, 1970-2 C.B. 195; *Wang v. Commissioner, supra*. To support this statement the *Wang* opinion cites prior case law as follows:

It has been held that an ascertainable standard exists when the language of the will or trust allows invasion of the principal only to the extent necessary to maintain the life tenant's present standard of living. Thus, words such as "comfort and support," "maintenance and support," "comfort and welfare," "proper care, support and maintenance," and "support, maintenance, welfare and comfort" have been held to constitute an ascertainable standard based upon the life tenant's present standard of living. However, it has been held that an ascertainable standard is not provided where there are used such expressions as "pleasure, comfort and welfare" ...; "her comfortable support and maintenance and for any other reasonable requirement" ...; "best interest * * * during illness or emergency of any kind" ...; and "illness, accident or other

unforeseen emergency. [Citations omitted throughout].

2. *Wang* holds as follows:

In the instant case the trust instrument provided that if at any time the principal of Fund A (the marital deduction trust) should be exhausted or should be insufficient, the trustees might thereafter in their sole and absolute discretion pay to or apply for the benefit of the wife so much of the principal of Fund B (the nonmarital deduction trust) as they in their sole and uncontrolled discretion might deem necessary or advisable “for her proper support, care and health, or for any emergency affecting the Donor's said wife or her family, first having regard to her other sources of income and other assets as certified to such Trustees by her.”

We think that this language does not constitute an ascertainable standard. The “emergency” is not limited whatsoever. It is broad enough to cover any type of emergency which might affect her or her family. It would seem that by this language the petitioner had something more in mind than merely ensuring the preservation of his wife's customary standard of living. Cf. *Lincoln Rochester Trust Company v. McGowan* [54-2 uste ¶10,975], (C. A. 2) 217 F. 2d 287. It should be observed that it is well settled that proof of extrinsic circumstances cannot supply the necessary element of ascertainability if the wording of the instrument does not furnish the basis for an objective standard. *Seubert v. Shaughnessy*, *supra*.

We accordingly hold that since the trust instrument itself does not provide a standard by which the interest which the donor transferred to the third parties is ascertainable and hence severable from the interest which he transferred to his spouse, the gift made to such third parties may not be considered as having been made to the extent of one-half by his wife.

3. Rev. Rul. 54-285, 1954-2 C.B. 302 provides in its entirety as follows:

A charitable deduction under section 812(d) of the Internal Revenue Code may be allowed on account of bequests or gifts of remainder interests to charity in cases where the will or instrument authorizes invasion of corpus for the comfortable maintenance and support of life beneficiaries if (1) there is an ascertainable standard covering comfort and support which may be either express or implied, and (2) **the probability of invasion is remote** or the extent of the invasion is calculable in accordance with some ascertainable standard. [Emphasis added.]

III. The GST Tax Rules.

- A. **Section 2652(a)(1)(B)** provides that, in general, the term “transferor” means, in the case of any property subject to the tax imposed by chapter 12, the donor, and that an individual shall be treated as transferring any property with respect to which such individual is the transferor.
- B. **Section 2652(a)(2)** provides that if, under section 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by such individual’s spouse, then such gift shall also be treated as if made one-half by each spouse for purposes of the GST tax.
- C. **Treas. Reg. §26.2652-1(a)(4)** provides that in the case of a transfer with respect to which the donor’s spouse **makes an election** under section 2513, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under section 2513. [Emphasis added.] This rule is applied in several PLRs, which also involved 9100 relief, including 200218001, 200422051 and 200616022.
- D. **If an election is made but a trust is wholly ineligible for gift-splitting**, then according to several PLRs, which also involved 9100 relief, the actual donor is treated as the transferor (see PLRs 200551009, 201108010 and 201125016) but note that in PLR 201108010, gifts in two tax years were involved and the spouse was treated as the donor for the first of the two years because the statute of limitations had run with respect to gift-splitting of the gifts on that year (but not in the second year). Some practitioners had believed, based on the reference to “mak[ing] an election under section 2513” in the regulation (see bolded language in II-C), perhaps merely by checking the gift-split box, that the GST tax 50% rule would apply even if no portion of the trust is eligible for gift-splitting. The PLRs

do not explain their reasoning for rejecting such an argument (or even indicate whether such an argument was made), but perhaps the bolded language from II-C provides the necessary authority.

E. Reasons supporting the conclusion in the PLRs.

1. Unlike Treas. Reg. §26.2652-1(a)(4), Code section 2652(a) does not refer to “making the election,” but states that “if, under section 2513, one-half of a gift is treated as made by the spouse . . . such gift shall be so treated for purposes of this chapter.” The Regulation is a stretch in treating the entire gift to a trust as if one-half made by each for GST purposes even though under section 2513 a smaller portion is so treated. However, the regulation is probably valid due to the ambiguities arising from a gift in trust that is partially eligible for gift-splitting. The same argument for validity would not seem to apply when no portion is eligible.
2. The first part of the sentence in the gift-splitting regulation that refers to “making an election,” makes it clear that the election being referred to is with respect to the transfer in question. One can only make the election with respect to transfers to third parties and, if made, the election applies to all such transfers. If no portion of the gift is severable, no portion is considered as having been made to others; consequently, how can one be considered to have “made [a gift-splitting] election” “with respect to” a transfer that is treated as made to the spouse?
3. As a policy matter, why should the fact that the box was checked to make the spouse the donor for gift tax purposes of other gifts in the same calendar year have any impact on the treatment of a gift that is wholly ineligible for gift-splitting.